PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Citizenship and Immigration Services

B6

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 22 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a church day care center. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a statement and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on March 12, 2001. The proffered wage as stated on the Form ETA 750 is $12.59 per hour, which equals $22,913.80 per year.

With the petition, counsel submitted a letter, dated March 15, 2002, from the church's pastor. That letter states that the church has six employees. The letter also names the employees and provides their social security numbers, but provides no job descriptions, titles, or salaries for those employees.

Counsel provided another letter from the pastor, also dated March 15, 2002, stating that the church's gross receipts during 2001 were $598,912.03.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on June 19, 2002, requested additional evidence pertinent to that ability. The Service Center stipulated that the evidence

should be either 2001 Form W-2 Wage and Tax Statements, federal tax returns, or audited financial statements.

In response, counsel submitted a letter, dated July 16, 2002. That letter stated that, because the beneficiary had no work authorization, she had been working for the petitioner on a gratuitous basis. Counsel also noted that the petitioner, as a non-profit entity, is not required to file a federal tax return. Counsel stated that, in the alternative, the petitioner was submitting bank statements as evidence of its ability to pay the proffered wage.

With that letter, counsel provided statements pertinent to four bank accounts. One of those accounts is in the name of Igreja Evangelica o Bom Pastor, Inc. Another is in the name of Igreja o Bom Pastor Missao. The third is in the name of Igreja Evangelica o Bom Pastor Payroll Account. The last is in the name of Igreja Evangelica Bom Pastor Escola de Treinamento Biblico.[1]

For the first three accounts, counsel submitted the twelve monthly statements for 2001. For the fourth account, counsel submitted statements for the last seven months of 2001. Counsel averaged the average statement balances for each of those accounts.[2] In the July 16, 2002 letter, counsel labeled those four averages the average monthly balances of those accounts. Counsel added those four average monthly balances together and noted that the sum is greater than the annual amount of the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 22, 2002, denied the petition. The director noted that, during 2001, the amounts in the petitioner's bank accounts decreased.

On appeal, counsel argues that the petitioner's bank statements are the next best evidence, after tax returns, of the petitioner's financial condition. Counsel did not state whether the petitioner had audited financial statements or annual reports available. This office notes that, pursuant to 8 C.F.R. § 204.5(g)(2), only copies of annual reports, federal tax returns, or audited financial statements are the preferred evidence of the petitioner's continuing ability to pay the proffered wage.

Counsel provides monthly statements pertinent to the mortgage on the church building and checks drawn to make payments on that account. Counsel notes that during 2001, the petitioner paid down the principal due on its mortgage from $315,853 to $136,677. Counsel states that $77,907 of the principal payments were extra payments, not yet due pursuant to the terms of the mortgage. Counsel states that a portion of the amount of those extra payments could have been used to pay the proffered wage, had that been necessary.

Counsel also provided a statement of coverage and premium from the petitioner's insurance company. Counsel notes that the buildings and other property are insured for $1,673,900. This office notes that the statement includes coverage for Pastoral Counseling Professional Liability and for Day Nursery/Student

---

[1] Counsel offered no evidence that each of those accounts belongs to the same non-profit entity. As that issue was not raised by the Service Center, however, this office will not pursue it.

[2] This office notes that counsel provided no reason for using the average statement balances in his calculations, rather than the ending balance for each of those months.

Excess Medical Payments. The statement appears to indicate that the church and the school are the same entity.

Counsel stated that, although the amounts in the petitioner's bank accounts decreased during 2001, the amount remaining at the end of the year was $23,651, an amount greater than the annual amount of the proffered wage.

In fact, the amount remaining in those accounts at the end of 2001 was $4,648.16, $7,473.02, $8,176.98, and $2,004.61. Those amounts total $22,302.77,[3] an amount slightly less than the proffered wage. The decision in today's case, however, is not affected by that difference.

Finally, counsel stated that "the petitioner has an equity of over $1.5 million in the church building." Although counsel did not state how he arrived at that figure, this office surmises that he subtracted the remaining principal amount of the mortgage for which he submitted information from the amount for which the building is insured. Counsel offered no evidence that the building is not otherwise encumbered.

In a submission to supplement that appeal, counsel submitted an estimate of the petitioner's church building and grounds from a real estate appraiser. The appraiser estimates the value of the property to be $850,000 as of September 10, 1998. The appraiser did not state how he arrived at that estimate. The appraiser did not state whether the property is encumbered or, if so, by what amount.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.[4] Second, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the preferred evidence of a petitioner's ability to pay a proffered wage.

Counsel observes that the petitioner paid down a mortgage on its property. Counsel alleges that $77,907 of the payments toward principal were in advance of the amortization schedule of that loan. In fact, the mortgage statements indicate that the scheduled monthly payment was approximately $7,700, and that the petitioner made payments considerably in excess of that amount.

Counsel asserted that the petitioner has over $1.5 million in equity in its real estate, but submitted no reliable evidence of that assertion. Subsequently, counsel submitted evidence that the real estate has a total value of only $850,000. Although the evidence of that much lower value is also of questionable reliability, this office need not reach that issue. The value of the petitioner's real estate is not readily available to pay wages. The value of that real estate is not correctly part of the determination of the petitioner's ability to pay the proffered wage.

---

[3] The sum of the ending balances on the December statements, rather than the average balances.

[4] This office notes that the director implied that, had the petitioner's bank accounts shown a consistent increase equal to at least the amount of the proffered wage, the director would have found that increase showed the petitioner's ability to pay the proffered wage. This might be an exception to the general rule, as stated above, that bank balances cannot demonstrate the ability to pay the proffered wage. Because the evidence in this case indicated no such increase, however, this office need not reach that issue.

Counsel's reliance on the petitioner's gross receipts is also misplaced. Showing the size of the petitioner's gross receipts is manifestly insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[5] or otherwise increased its net income[6], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is readily discernible from copies of annual reports, federal tax returns, or audited financial statements.

The reason that only copies of annual reports, federal tax returns, or audited financial statements are the preferred evidence of a petitioner's ability to pay a proffered wage is that they are the only evidence which would reliably show the entire amount of the petitioner's receipts and the entire amount of the petitioner's expenses. The source of the funds in the petitioner's bank accounts and whether those funds are already earmarked for expenses cannot be determined by reference to a bank balance. Similarly, that the petitioner made payments against the principal amount of its mortgage does not indicate the source of those funds. Whether those mortgage payments were made with the petitioner's own funds or with borrowed funds, for instance, cannot be discerned from a mortgage or account statement.

Counsel notes that the petitioner is not obliged to file a tax return and states that it has not. That fact does not excuse the petitioner, however, from submitting reliable, competent evidence of its continuing ability to pay the proffered wage beginning on the priority date.

The petitioner is obliged to demonstrate, with reliable, competent evidence, that it was able to pay the proffered wage beginning on the priority date, that it has continued to be able to pay the proffered wage, and that it will continue to be able to pay the proffered wage until the beneficiary adjusts status to permanent residence. Counsel has submitted no such reliable, competent evidence. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

---

[5] The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

[6] The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.